

PPP Country Paper

Mozambique

Submitted to SADC-DFRC 3P
NETWORK Public-Private-Partnership
Working Group

LIMESSTRASSE 26, 61273 WEHRHEIM - 2013

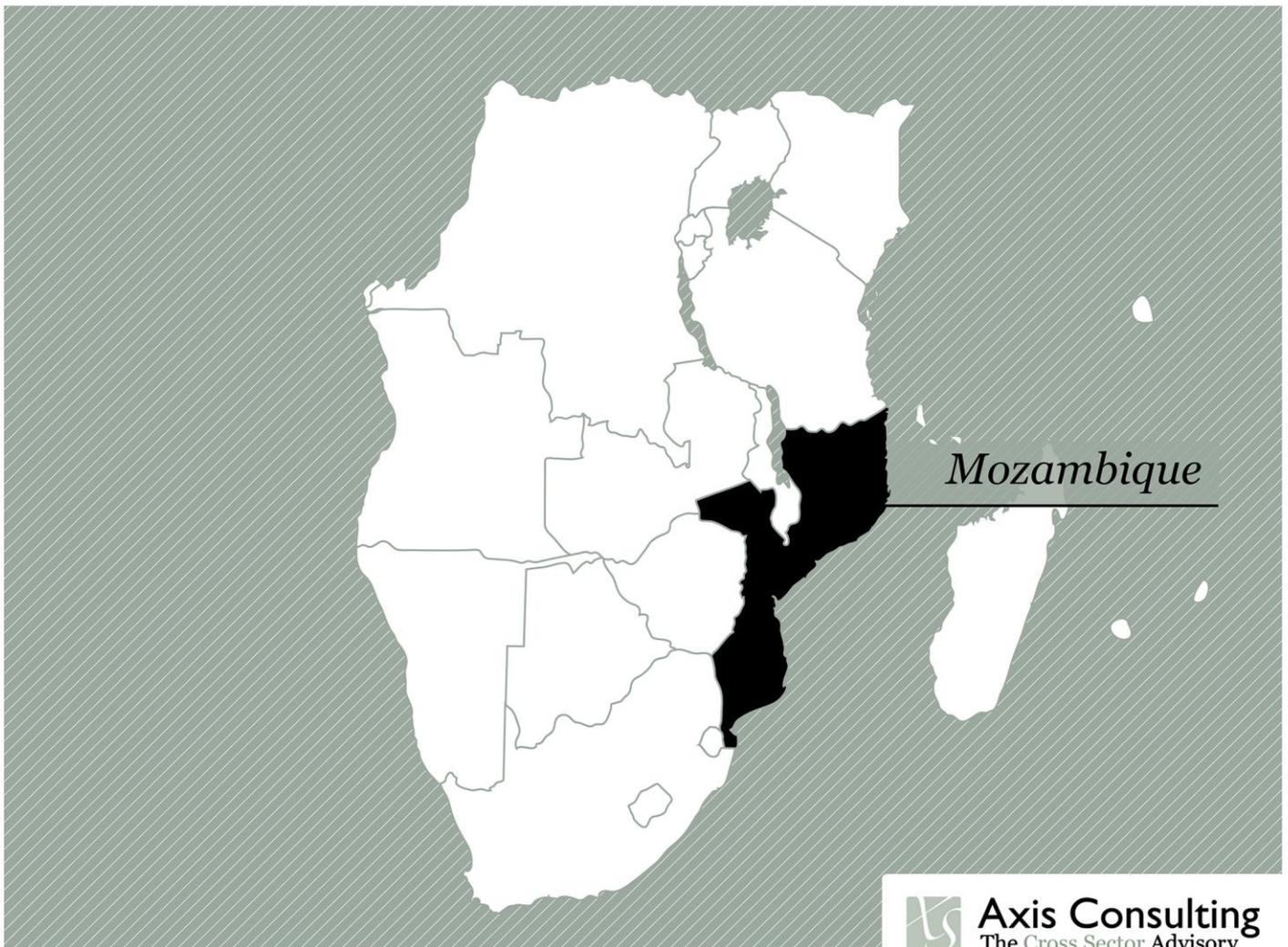


Table of Contents

List of Figures	IV
List of Abbreviations	IV
1. Engagement Overview	6
2. Introduction	6
3. Methodology	8
4. Examination of the Term PPP	9
5. Application of SADC PPP Framework Road Map	10
5.1 PPP Policy in Mozambique	11
5.2 PPP Institutional Responsibilities in Mozambique	14
5.2.1 Role of PPP Unit in Mozambique	14
5.2.2 PPP Regulation, Approval and Implementation Roles in Mozambique	16
5.3 Mozambique Legal Framework	17
6. Recommendations	19



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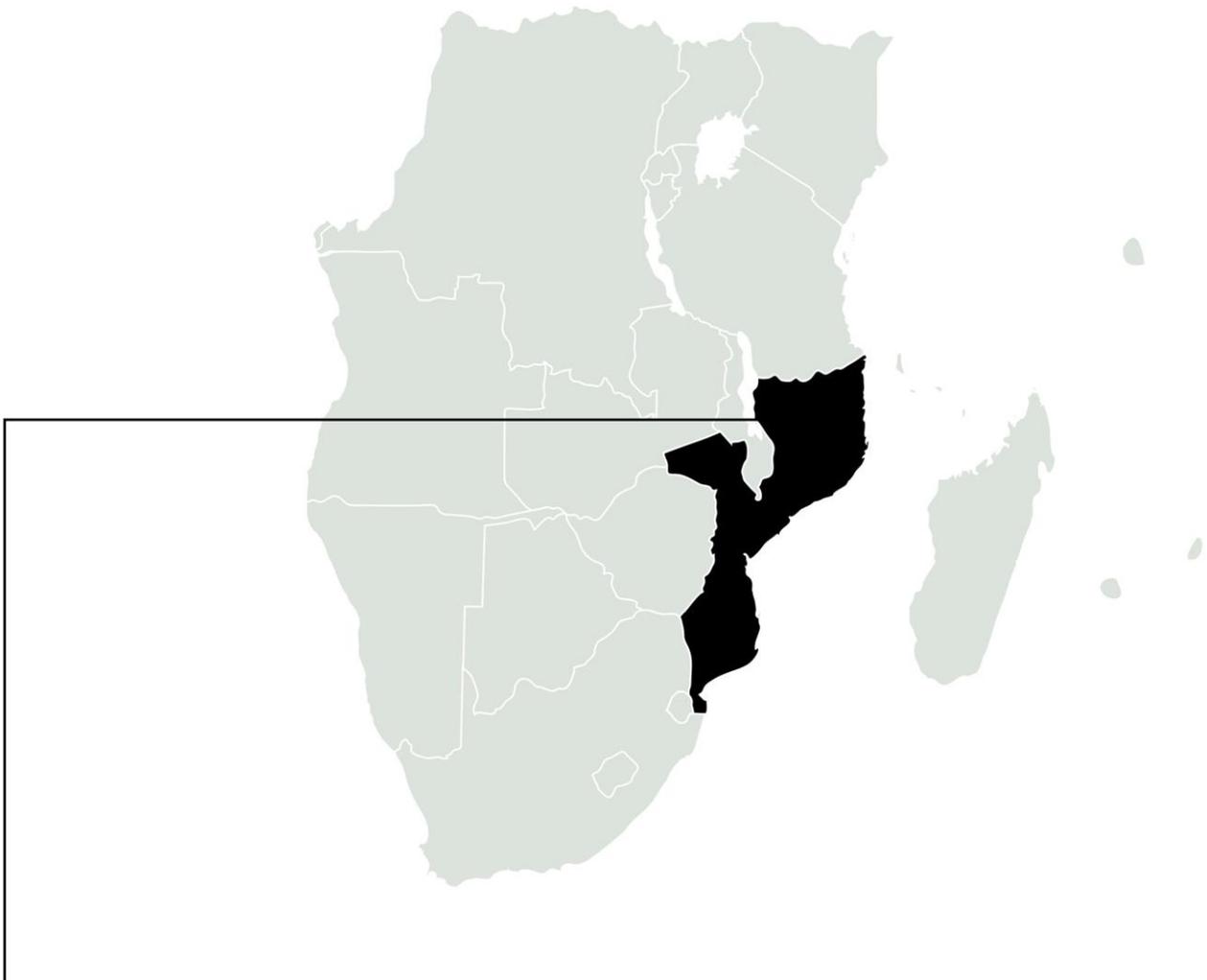
List of Figures

- Chart 1: Evaluation of Key characteristics of PPPs in Mozambique
 Chart 2: Overview SADC Road Map, Regional Strategy Paper, 2012
 Chart 3: Overview of Types of PPPs in Mozambique
 Chart 4: Overview of Weaknesses of the PPP Law related to the Institutional Framework
 Chart 5: Overview of Issues addressed in the Regulation 2012

List of Abbreviations

AfDB	African Development Bank
BCs	Business Concessions
BOT	Build, Own and Transfer
BOOT	Build, Operate, Own and Transfer
CAs	Contracting Authorities
DBOT	Design, Build, Operate, Transfer
DBOOT	Design, Build, Own, Operate, Transfer
IDA	International Development Assistance
ISC	Inter-Ministerial Steering Committee
IPP	Independent Power Producer
GDP	Gross Domestic Product
LSPs	Large-Scale Projects (LSPs)
MDGs	Millennium Development Goals
MoF	Ministry of Finance
PPP/s	Public Private Partnership/s
PVR	Present Value of Revenue
ROT	Rehabilitate, Operate, Transfer
ROOT	Rehabilitate, Own, Operate, Transfer
SADC	Southern African Development Community
SADC3P	Southern African Development Community- Development Finance Resource Centre PPP Network
TRAC	Trans-African Concessions
VfM	Value for Money





KEY INDICATORS - 2012

Mozambique

Population (Mio.)	23.9
GDP per capita (US\$)	650
PPP Level of Maturity	Low- Medium

(Regional Strategy Paper, 2012)

1. Engagement Overview

XS-Axis Consulting, Wehrheim (The Cross Sector Advisory) has been engaged by the Client, Southern African Development Community-Development Finance Resource Center PPP Network (SADC3P) to prepare 14 country papers taking a look at current practice of PPPs with a specific focus on PPP Policy, Institutional Arrangements, and Legal Frameworks as a follow-up of the Draft Regional Strategy paper submitted to SADC3P in November, 2012. This paper focuses on Mozambique's PPP Policy, Institutional Arrangements and Legal Frameworks as a Member State in SADC providing specific recommendations for the implementation or enhancement of private sector participation in the development of public infrastructure in the country. The main objective is to serve as a strategic paper for the Government of Mozambique, and its Ministries in order to refine, develop and ultimately develop further its PPP Policy, Legal Framework, and Institutional Arrangements aimed at closing the 'infrastructure gap', and its negative impact on economic growth, job creation and social cohesion in Mozambique. Moreover, the country paper shall serve the SADC3P Network to identify areas of support to be offered by the SADC 3P Network towards identified Member States.

We render this report to the best of our knowledge and belief. Our results are based on the most recent verifiable information available at time of the report. Public sources were used where appropriate and fact based observations were made.

2. Introduction

Mozambique, officially the Republic of Mozambique has a population of 23.9 Million (Mio.) with a stable political environment and multiple peaceful elections which have been held well since the peace treaty in 1992. Its neighbouring countries include Tanzania to the North, Malawi and Zambia to the Northwest, Zimbabwe to the West, Swaziland and South Africa to the Southwest and the Indian Ocean to the East. Since 2005, Armando Guebzua has been President of Mozambique. Mozambique is still one of the poorest countries in the world, however, the Government has managed to stabilize the economy to close collaboration with development partners and civil society (World Bank, 2013, web page). The economy has succeeded in sustaining a long-period of high growth despite the adverse effects of the global economic downturn. According to African Development Bank (AfDB), from 1993 to 2009, Mozambique was the fastest growing non-oil economy in Sub-Saharan Africa, with growth averaging 7.5% per year. The economic growth of Mozambique has been bolstered by a boom in large foreign investments in the burgeoning energy and natural resources sectors. GDP growth rates are expected to remain near 8%. Mozambique has maintained its robust performance in 2012 with a progressive increase in coal production, the implementation of large infrastructure projects, coupled with credit expansion.

According to AfDB, Mozambique should strengthen its efforts towards bolstering of significant structural change, reducing poverty and fostering human development to increase revenue collection, properly manage debt levels and improve investment planning (African Development Bank (AfDB), Republic of Mozambique: Country Strategy Paper 2011-2015, 2011, p.1). Overall, AfDB estimates a medium-term forecast of 8.5% and 8% as far as the annual growth rate for 2013 and 2014 is concerned (AfDB, 2013, web page).

Mozambique's global competitiveness ranks 138 of an overall of 144 countries, thus, remaining disappointing (the least performing country) compared to other SADC Member States (World Economic Forum, The Global Competitiveness Report 2013–2014, 2013, p.286). Rankings for



Mozambique as far as the infrastructure quality is concerned compared to other SADC countries --this relates to the quality of the overall infrastructure and quality of roads, railroad infrastructure, port infrastructure, air transport infrastructure, and available airline seat kilometres-- is also quite poor (ranking 126, the least performing country). It reflects Government's lack of efforts to improve the level of service provision as far as infrastructure is concerned (World Economic Forum, The Global Competitiveness Report 2013–2014, 2013, p.286). The low level of competitiveness of Mozambique is an indication of Government's and policy makers' poor commitment, and the political will as an essential driver to achieving sustainable growth in the country and prosperity for its people. In terms of the most problematic factors affecting growth, and sustainability in the country, the Global Competitiveness Report 2012-2013 provides an insight focusing on lack of accessibility to financing and corruption as the main limiting aspects hindering progress in Mozambique. Also the supply of infrastructure remains a bottleneck to proper economic performance.

In August 2011, the Government published the new Law No. 15 on PPPs, Large-Scale Projects (LSPs) and Business Concessions (BCs), the so-called "PPPs, LSPs, and BCs Law" aimed at attracting investment, economic and social development in the country. The Law established the guidelines of the awarding procedures, the implementation and monitoring of various sets of contractual arrangements to help bring greater contractual uniformity and lead to a new wave of PPP projects in infrastructure in Mozambique. The "PPPs, LSPs, and BCs Law" clarifies the vision and rationale behind introduction of PPPs schemes, guiding principles, policy objectives, and PPP types, implementation Framework suited for PPPs in Mozambique providing remedy for the challenges ahead in the country. Most recently, the Government of Mozambique has approved new Regulation to the PPP's, LSP's and BC's Law, by way of Decree 16/2012, of 4 June 2012 to further regulate pertinent matters related to these three areas of complex projects.

In 2012, the International Growth Centre (IGC) conducted a working paper discussing the status of PPP projects in Mozambique. Accordingly, the Government of Mozambique was and is attracted by the general idea of using PPPs to rehabilitate its infrastructure, given significant capital requirement of infrastructure investments, and the lack of technical capacity in the Government to manage these kind of complex projects (International Growth Centre (IGC), Assessment of Public-Private Partnerships in Mozambique, 2012, p.2). Yet the authors recognize that results have not been as expected. A number of PPPs have been carried out, for instance Trans-African Concessions (TRAC), the ports of Maputo, Beira and Nacala, and the Ressano Garcia, Sena and Machipanda, and Nacala railways without the existence of a structured or established Legal PPP Framework. Thus, early projects have had their own rules and there was little continuity and learning. KPMG highlights that most of these projects adopted the form of unsolicited bids or private sector led initiatives (Draft KPMG Report, Country Paper, 2013).

The first PPP experience in the country was a World Bank spearheaded project aimed at promoting water distribution in 1999. Thereby, management and revenue collection were delegated to private investors. Prior to establishing a Framework, another project in the road sector was successfully implemented and awarded abiding by South African PPP procedures. The project contained building, operating and transferring and was financed over 20% equity from promoters and lendings of four major banks of South Africa and AfDB. Another infrastructure project was introduced in 2004 covering management and rehabilitation of the railway system between Sena and Machipanda. The Analysis of IGC shows that the private party did not hold the underlying standards in terms of technical requirements and deadlines and finally the partnership failed (International Growth Centre (IGC), Assessment of Public-Private Partnerships in Mozambique, 2012, p.3). Another railroad project, called Ressano Garcia, was successfully implemented after more than 10 years of negotiation and



elimination of problems occurring within the PPP Project. Furthermore, in order to improve the road network, a PPP Project, entitled “Nacala” was implemented in the beginning of 2000. Against recommendations in terms of risk sharing, the public partner became operator as well as regulator which were not intended. One of the more successful projects is the PPP Maputo Port project between the public sector and Gringrod and DP World initiated in 1999 which was extended in 2010 for 15 more years -- leading to a higher capacity and investments. In contrast to Maputo Port, the Government kept the authority in case of Beira Port, but has assumed the role of operator, and regulator which is usually not the first choice and desirable. Operations started in 1996 and the contract duration lasts for a period of 26 years (IGC, Assessment of Public-Private Partnerships in Mozambique, 2012, p. 18-27).

This paper is to be considered as a follow-up strategic document to the Regional Strategy paper submitted to SADC3P in November, 2012 recognizing that PPP Frameworks do not develop in isolation, but evolve over time along a PPP maturity curve that often responds to various challenges faced while actually implementing PPPs in specific cultural, legal and procedural and institutional settings. The Regional Strategy document examined the current status of PPP Frameworks across all Member States to classify SADC countries into four categories as far as their level of maturity of PPP frameworks is concerned. It distilled Mozambique to belong to those increasing number of countries in SADC that have established a PPP Policy and/or a PPP Law aimed at the promotion of their PPP schemes. The next chapter will elaborate on Mozambique’s specific PPP experience, its PPP Policy, Legal and Institutional Framework as a continuation of the above mentioned cross-country Regional Strategy aimed at providing an in-depth insight into the specific country strategy for Mozambique.

3. Methodology

Our approach in this country specific paper is to provide an overview of Mozambique’s PPP Policy, Institutional Arrangements, and Legal Framework by taking into account the country-specific strategies, and drivers for resorting to PPPs considering the individual level of PPP development in the country. The ultimate idea is to draw lessons for Mozambique, and to come up with specific recommendations concerning potential areas of assistance needed. The Regional Strategy document distilled Mozambique in 2012 to be prone towards promoting PPPs, and establishing institutions to promote the existing PPP Framework. This paper will touch upon this evaluation and move further to analyze the current progress made in Mozambique aimed at depicting those developments made since 2012 as far as the PPP Framework conditions are concerned.

Methodologically, we will first take a look at the definition of the term PPP in Mozambique since experience across countries shows that lack of a proper term and definition of what a PPP typically encompasses does indeed result in poor implementation of PPP schemes. Next, we will evaluate Mozambique’s approach towards developing a PPP Framework based on the recommendations provided to the Minister’s of Finance and the road map developed for SADC countries aimed at establishing a typical good practice PPP Framework. This includes the evaluation of Mozambique’s PPP framework in terms of its PPP Policy –examining whether its Policy contains Government’s formulation of its objective to use PPPs, the scope of the PPP program and the implementing principles. Then, we will consider whether Mozambique’s operational Framework related to the implementation of PPP processes and the institutional responsibilities underpins its national PPP scheme. In addition, we will take a look at the legislature and entities participating in the PPP program as an integral part of any good Framework approach. Ultimately, we will evaluate as to whether Mozambique’s PPP programs are backed up by prudent laws and regulations enabling public sector to



enforce and implement PPPs and set the boundaries within the contractual context. The overall idea is to distil proper recommendations from our work for SADC3P, and the Government of Mozambique as far as next steps is concerned.

4. Examination of the Term PPP

In Mozambique, the term PPP is defined quite clearly in the Law No. 15 of August, 2011 in Article 2, Paragraph a). The “PPPs, LSPs, and BCs Law” elaborates on the purpose of introducing the Legal Framework, not only to regulate PPPs, but also large scale projects and business concessions. Accordingly, ...“public-private-partnership agreement, in abbreviation PPP, an undertaking in a public domain area, excluding that of mineral and petroleum resources or in an area of provision of public services, in which, under contract and with full or partial financing of the private partner, that partner undertakes, vis-à-vis the public partner, to accomplish the necessary investment and to operate the respective activity, for the efficient provision of services or goods the availability of which to users is the responsibility of the State to guarantee” (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 2).

Next to PPPs, the Law regulates matters related to large-scale projects, in abbreviation LSP implying “...undertaking of an investment authorized or contracted by the Government, the value of which, with reference to the date 1 January 2009, exceeds 12.500.000.000,00MT (twelve billion and five hundred million Meticaís)”, and also business concessions, in abbreviation BC to include ...”, an undertaking the object of which is the prospecting, exploration, extraction and/or use of natural resources or other resources or national property assets, carried out under the terms of the respective contract or other means of creating title to the rights granted by the government in the scope of that undertaking” (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 2, Paragraph 2).

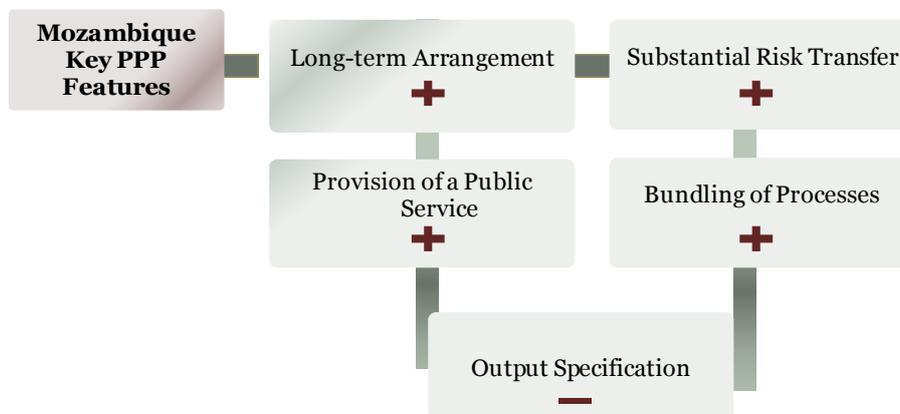


Chart 1: Evaluation of Key characteristics of PPPs in Mozambique

The analysis of the translated version of the PPP Law indicates clearly that these arrangements are meant to cover public services which in general would be the responsibility of the Government. The duration of PPPs may last from short- and mid- to long-term arrangements. This is explicitly defined in Article 22 of the “PPPs, LSPs, and BCs Law” to take into consideration the economic, and financial attractiveness, the time required for its implementation and the period of recovery of the capital invested when determining the duration of a PPP (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 22). However, PPPs shall, in no case, exceed the period of a) 30 years, for greenfield concession contracts; b) 20 years, for a concession contract and assignment of operation contract for an existing undertaking requiring rehabilitation or expansion; and c) 10 years, for a



management contract for an operational undertaking. Thus, the Government keeps the length of contracts long- to medium term and flexible to be able to react to various contractual requirements.

As far as bundling of functions is concerned, Article 21 defines the types of contracts including Build, Operate and Transfer (BOT), Design, Build, Operate and Transfer (DBOT) and Rehabilitate, Operate and Transfer (ROT), and Rehabilitate, Own, Operate and Transfer (ROOT) (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 30, Paragraph 2). Article 15 addresses explicitly the need for proper risk allocation in terms of professional, technical, technological, commercial or management capacity to be assumed by the private partner (paragraph 1, a)), whereas all political and legislative risks as well as conflicts of interest (paragraph 1, b)) are allocated to the public sector. Articles 2 and 3 clearly define the scope of PPPs and the economic sectors they shall apply to. Investments with the underlying nature of projects related to minerals, and oil resources as well as simple goods and services, supply contracts awarded to State institutions, including public works and consultancy services contracts are not included in the term (the PPP Law does not set forth any requirement concerning the degree of dependence vis-a-vis the public contract) or projects of altruistic, social, humanitarian, cultural, sportive or similar non-profit nature (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 2, Paragraph 2).

Furthermore, a solid payment structure is essential for a successful implementation of PPPs, therefore, the Government is responsible to participate in financing (via financial guarantees), or to facilitate access to guarantees for financing requested from multilateral or government institutions, or to grant a subsidy or compensation (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 20, Paragraph 1) for the provision of its services ((SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Introduction). The Government has introduced a focus on user-pay principle which is integrated in the Law (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 12, Paragraph 2) to ensure the compensation of costs incurred and profit margins. It may be noted that there is no specific focus on output specification as far as the term PPP in the “PPPs, LSPs, and BCs Law” is concerned. However, transfer of risks has been addressed separately in Article 15 of the “PPPs, LSPs, and BCs Law” which defines the risks of both parties. Overall, our examination of the term indicates more or less a solid understanding of the term PPP as embodied in “PPPs, LSPs, and BCs Law”, 2011.

5. Application of SADC PPP Framework Road Map

The experience to date across comparators and SADC countries indicates that there is no unique formula for developing a sound PPP Framework. More specifically, the development of a common Framework for SADC needs to take into account the economic and political context of countries, their historically grown institutional and legal structures as well as the actual experiences with PPPs so far, with some countries having made considerable strides and others having made very little progress, and some none at all. Nevertheless, if PPPs are to work and render the expected results, we suggested in the Regional Strategy document a number of requirements for a proper PPP Framework with key features related to Policy, Institutional Structures and Legal setting (see next chart).

Thus, successful PPP schemes are characterized by clear policy statements, competent and enabled institutions that can appropriately identify, procure and manage PPPs, and efficient oversight procedures as well as proper legal frameworks. Nevertheless, it must be borne in mind that firm political commitment, stakeholder dialogue and a number of other factors such as a sound and strong PPP pipeline are important contributing factors for the promotion of PPPs in a larger context. It is also



important to be aware of the contribution of sector reforms and their role in developing and supporting PPP schemes. In a number of countries, sector institutions, for instance, power sector regulators have had an important role as far as the promotion of IPPs and investment in the power sector are concerned. It is in this context that Member States with a low level of PPP maturity should acknowledge the relevance of sector institutions in terms of their contribution towards developing PPPs over time and across various sectors --which are however best supported by setting up efficient and proper frameworks at the national level. In this section, we examine these various elements of a PPP Framework to see how far Mozambique has proceeded in terms of its PPP Policy implementation and practice as well as looking into its Institutional structures and Legal Framework more in-depth as well as the political commitment of the Government and its approach towards stakeholder integration into the PPP process.

SADC Framework Roadmap

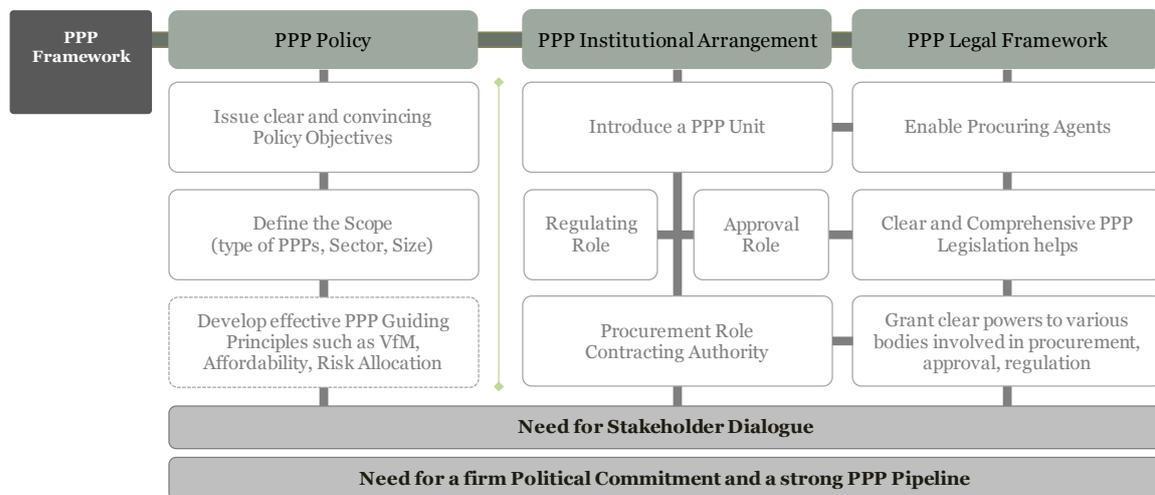


Chart 2: Overview SADC Road Map, Regional Strategy Paper, 2012

5.1 PPP Policy in Mozambique

Mozambique has not established an explicit PPP Policy yet, however, the objectives associated with the promotion of PPPs may well be depicted from the Law issued in 2011. Herein, the objectives are explicitly formulated in Article 12 to ensure “...efficient qualitative and quantitative provision of public goods and served to users and the economic appreciation of the property assets and other national resources integrated in that undertaking” (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011 Article 12, Paragraph 1). The general idea behind introduction of PPPs is to obtain a proper risk allocation and attract business as well as to strengthen investment opportunities while ensuring an efficient provision of goods and services.

The scopes of PPPs should go along with the objectives of the Government, potential Value for Money (VfM) of the arrangement and the infrastructure needs, and they are also defined in terms of what they are not and what the Government does not aim at pursuing with their procurement (World Bank, 2012, p. 71). As far as Mozambique is concerned, the type of PPPs or desired contracts and the sector application as well as the size of the projects concerned are defined explicitly in the Law. The Law excludes contracts for simple provisions and non-profit PPPs (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 3, Paragraph 2, a)-b)) as well as projects in the mineral and petroleum sector (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 2,



Paragraph 2, a)-b)).

The “PPPs, LSPs, and BCs Law” defines in Article 21 clearly the type of PPPs to include all contracts such as concessions; operation and management contracts. Quite explicitly, concession contracts encompass Build, Operate and Transfer projects (BOT); b) Design, Build, Operate and Transfer (DBOT) projects; c) Build, Own, Operate and Transfer (BOOT) projects; d) Design, Build, Own, Operate and Transfer (DBOOT) projects; e) Rehabilitate, Operate and Transfer (ROT projects); or f) Rehabilitate, Own, Operate and Transfer (ROOT) projects. Mozambique expands the definition of PPPs to include also medium-term partnerships such as operation and management contracts. OECD criticizes the narrow definition of types of contracts excluding such contractual types such as Build, Operate, and Own (BOO) models where contractors would normally have ownership rights in the project, thus allowing them to mortgage assets and secure better financing terms (OECD, OECD Investment Policy Review, 2013, p.125). However, it is important to mention that the dividing line between BOOs, and privatizations is thin, and thus it is quite understandable that the Government focuses on those types of PPPs that indeed allow for transfer of ownership at the end or via leasing, etc.

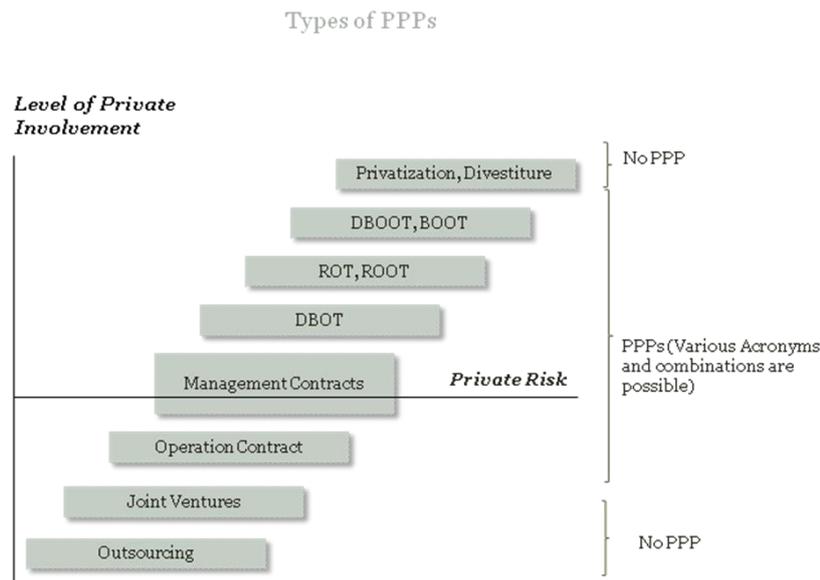


Chart 3: Overview of Types of PPPs in Mozambique

On top, the “PPPs, LSPs, and BCs Law” defines the scope for LSPs to be at minimum -- 12.500.000.000,00MT (twelve billion and five hundred million Meticaís) which is roughly USD 490 Mio. as far as large-scale projects are concerned (PPP Law, Article 2, paragraph 2, 2011) –it does not define a volume for PPPs.

It is interesting that the Government has introduced a number of concession fees to be imposed upon award; or an additional fee for concession or operating license and taxes on the company. The award fee varies from 2% to 5% of the value of the asset. OECD reaffirms that these kinds of fees do serve as deterrance to private investors not only increasing the overall costs, but also posing a hurdle to entering into PPPs in the country. There is also a concession fee comprising a fixed fee of 5% to 10% of the asset value plus a variable fee of 5% to 10% of the revenue generated by the concession company, net of tax. Next, there is a management fee defined at 10% of the concessionaire’s gross revenue, following trends of other kinds of management contracts, as the public entity usually pays the private company instead.



In order to put potential PPPs into place, governments formulate binding principles and supplement those by additional regulations, and concrete processes. According to the OECD clear implementing guidelines are a positive signal to the market conveying the underpinning standards against which those responsible for putting PPPs in place may be held accountable (OECD Handout 2007, p.15). These include affordability, appropriate risk transfer and VfM. Mozambique has clarified more soft principles in its “PPPs, LSPs, and BCs Law.” It lays out concretely in Article 4 of the “PPPs, LSPs, and BCs Law”, the guiding principles contributing towards a successful outcome of PPP projects in the country. These include “a) its proper fit in the policy, strategy and development plans of its respective economic or social sector; b) its contribution to the development of the effective capacity for efficient and rational use and economic appreciation of national resources and goods; c) equity in the sharing of benefits arising from each undertaking, among the contracting parties, actors and concerned or affected parties; d) commitment to the prevention and mitigation of risks inherent in each specific undertaking; e) business freedom and competitiveness and removal of restrictions which may jeopardize the feasibility and economic appreciation in the pursuit of the undertakings; f) creation and maintenance of jobs and professionalization and transfer of know-how to Mozambican employees and managers; g) its contribution to the development of the national capital markets and the promotion of greater economic inclusion of Mozambicans in each undertaking; h) establishment of business partnerships between the PPP, LSP and BC undertakings and the micro, small and medium enterprises, as well as the transfer of technology and know-how; i) pursuit of programs, projects or actions of social responsibility and sustainability, and social development with the local communities. j) adjustment to existing legal frameworks; k) adjustment to procedures and measures for monitoring legality and compliance by the Administrative Court” (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 4, a)-c)).

In addition, guiding principles pertain to user pay principle, compensation of costs incurred, and profit margin; maintenance of State Property; and risk sharing as some important rules governing PPPs. Risks imputable to the private party and to the State are identified, the following risks (among others) being the responsibility of the private party and of the contracted partner:

- i. risk of political and corporate conflicts of interest (among other),
- ii. financial and exchange rate risk,
- iii. risk of reduced demand or supply in the market (excluding exceptional situations contractually agreed),
- iv. risk of depletion of venture’s residual value, or
- v. environmental impact risk.

Other guiding principles include share of financial and socio-economic benefits (also applicable to LSP and BCs); in strategic or special socio-economic interest PPP ventures, co-participation in financing, provision of financial guarantees or concession of subsidies or compensation by State are admitted. Risk transfer is separately mentioned in Article 15 of the PPP Law which defines the risks of both parties. Herein, the risks for the private party relate to professional, technical, technological, commercial or management capacity (SAL & Caldeira, Free Translation “PPPs, LSPs, and BCs Law” n° 15/2011, Article 15 Paragraph 1, a)), whereas, all political and legislative risks as well as conflicts of interest (paragraph 1, b)) are allocated to the public sector.

IGC analysis of the Law conducted in 2012 emphasizes that the PPP program contains too many guiding principles and objectives (as described in Article 4 and others). Not only attracting capital; promoting socio-economic benefits; generating revenue for the Government; but also provision of training and employment of Mozambican personnel; creating a stock market are all formulated as official objectives attached to application of PPPs. They observe that these multiple objectives may be



assigned weights discretionally in the scoring function of PPP bids. This flexibility in deciding the scoring function is considered as risky, since it can lead to corruption of the bidding system. Given the civil law tradition in Mozambique, IGC recognizes the need to incorporate more contractual conditions, and not leave them to be decided in each individual contract (IGC, Assessment of Public-Private Partnerships in Mozambique, 2012, p.6). The latter feature increases the cost of entry into the Mozambican PPP system as contractual conditions can change from contract to contract and are not standardized. This provides an advantage to incumbents, which are already experienced with the PPP system and can influence specific aspects of future contracts.

5.2 PPP Institutional Responsibilities in Mozambique

The “PPPs, LSPs, and BCs Law” regulates, with some detail, the rules covering matters regarding the powers of Escorial and Financial Supervisor (Tutela Sectoriale Financeira), the Regulatory Authority (Autorida de Reguladora), and the Implementing Entity (Entida de Implementa dora). The Institutional Framework related to PPPs, LSPs and also BCs is laid out in the “PPPs, LSPs, and BCs Law” in Chapter II, Articles 5-11, whereby all contractual forms shall be subject to sector oversight conducted by the Government entity responsible for the area or sector in which each project is located. The functions and responsibilities of these sector oversights shall be complemented by the duties and powers of the respective sector or subsector-specific regulatory authority. In particular, it is the responsibility of the regulatory authority, in the respective sector or subsector-specific area, to ensure the economic-financial balance between the contracting parties, the protection of the users’ interests and the maintenance and sustainability of the undertaking.

Article 6 defines the role of financial oversight of PPPs, LSPs and BCs to be carried out by the Government entity that oversees the Finance area, which shall define and establish mechanisms and procedures for permanent inter-institutional coordination with each entity responsible for sector oversight. It is the responsibility of the Government to nominate and enable the entity responsible for the inter-sector coordination and centralization of the economic, financial analysis and evaluation of PPP, LSP and BC undertakings, as well as for monitoring the equitable sharing of benefits and the prevention of risks in the respective undertakings.

5.2.1 Role of PPP Unit in Mozambique

KPMG draft country report, dated 2013 reinstates the establishment of a central PPP Unit housed at the Department of Economic Affairs within the Ministry of Finance in 2010. Accordingly, this new entity reports to the Ministry of Finance, and is in charge of approval of projects involving a concession of a public asset or a process which involves the use of government funds (Draft KPMG Country Report, 2013).

Nathan Associates conducted an analysis of the draft Law version dated April, 2010 being critical about the proposed roles for the PPP Unit. They highlighted that the Unit possesses certain coordination responsibility (Art. 8) and may be a useful body, but there was too much of a focus on control, and no explicit facilitating tasks (e.g., in permitting and licensing issues). They also emphasized the need to render the Unit powers and autonomy to play an effective role in coordinating PPPs – as a subordinate entity within the Ministry of Finance or other entity entrusted with financial oversight (USAID Trade and Investment Project (TIPMOZ) by Roger Manring of Nathan Associates Inc, 2010, p.4). If there was to be a double tutela, they recommended to introduce an “Inter-



Ministerial Steering Committee” (ISC) to lead coordination of Mozambique’s PPP Policy, and operations. This is the case in many other countries across SADC. The next chart provides an overview of the issues and problems considered by Nathan Associates and USAID as far as the Institutional Framework is currently concerned.

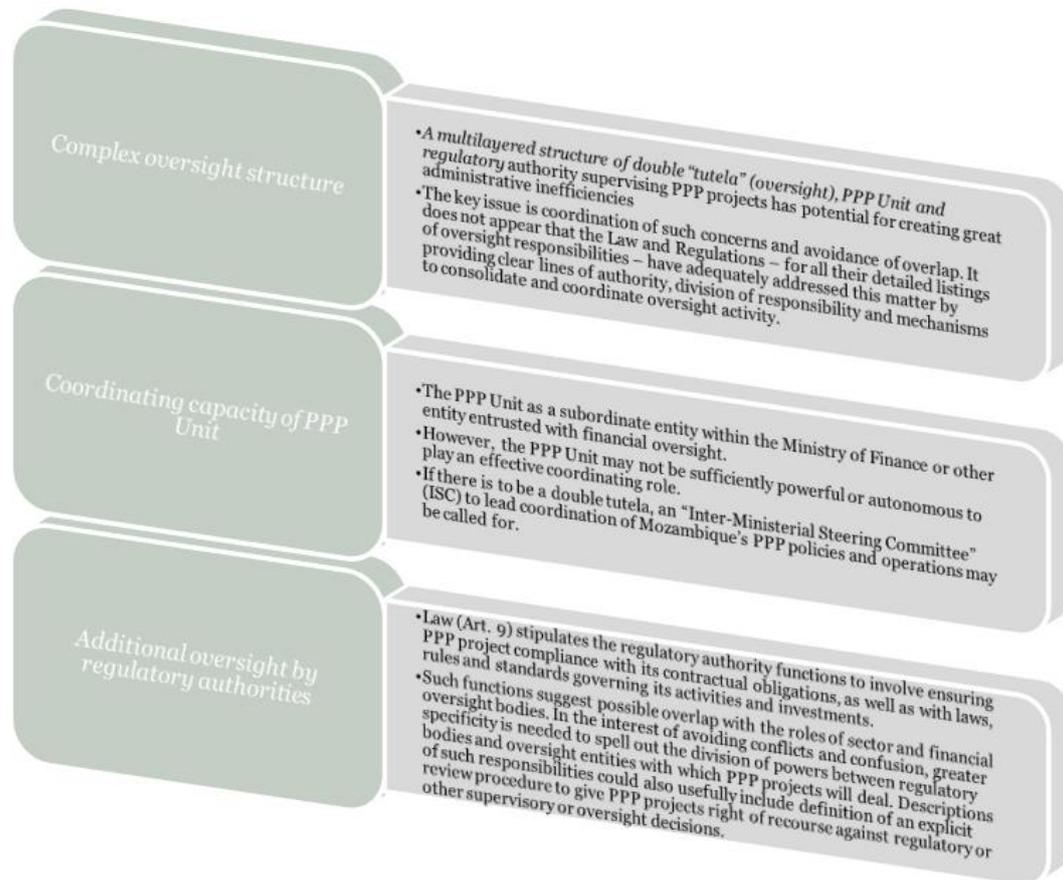


Chart 4: Overview of Weaknesses of the PPP Law related to the Institutional Framework,
Source: USAID Trade and Investment Project (TIPMOZ) by Roger Manring of Nathan Associates Inc, 2010

Next to Nathan Associates, SADC Banking Association financed a study on PPPs in Mozambique taking a look at the institutional capacities concerning implementation of PPPs. Interviews were conducted to suggest that institutional capacity in Mozambique with respect to procurement, design and identification of PPPs – in both Government and the private sector – may be limited (SADC Banking Association, Edward Nathan Friedland, SAL Consultoria Investimentos, Overview of Regulatory and Institutional PPP Environment in Mozambique, 2010, p.18). They deduced this to be not surprising considering the general shortage of trained personnel in the Government (and particularly in the provinces). They find this to be an overall reflection of lack of experience and capital of the national private sector with respect to PPPs.

Nevertheless, with proper additional training and limited technical assistance, the authors find there is every reason to believe that PPPs may be managed well in Mozambique by Mozambicans. In terms of skills base, the study indicated that there is a general lack of proper management and academic skills in the country. For instance, of the 15 provincial directors and department heads surveyed, none had any university education, just under half had completed high school and just over half had only a middle school education (SADC Banking Association, Edward Nathan Friedland, SAL Consultoria



Investimentos, Overview of Regulatory and Institutional PPP Environment in Mozambique, 2010, p.19). They also took a look at the skills base of private sector for PPPs to find out that a number of interviewees, in both Government and the private sector, averred that few Mozambican firms had the experience (or the capital) necessary to take a leading role in many PPPs, especially those of a larger scale. However, a few pointed out that experience in a particular business is not the only prerequisite for success as a PPP contractor; local knowledge, whether sector, practical or cultural, is also an important ingredient which may help to foster PPPs in the country.

The authors further examined the management skills needed to monitor properly PPPs on behalf of the Government in Mozambique since PPPs require a different approach to management, as well as management skills distinct from those often cultivated in the public sector in Mozambique. It was important to take a look at these competencies since in many PPP arrangements a Ministry, Department or public agency is no longer directly delivering services but is, rather, contracting a third party to deliver such services on its behalf. Overall, they found that learning to manage for outcomes is a particular challenge in the Mozambican public sector. To do so, the authors emphasized the need for staff of the Ministry, Department or agency take the required conceptual steps. This includes first to raise awareness within Ministries or Departments about the required roles beyond service delivery. The idea that agencies of government exist to serve their clients, understood as a specific part or all of the public, seems to be far from being a universally acknowledged concept in the Mozambican public service. The study makes clear that many public servants seem sincerely to believe that their primary, if not exclusive, role is to police the conduct of the persons under their jurisdiction (SADC Banking Association, Edward Nathan Friedland, SAL Consultoria Investimentos, Overview of Regulatory and Institutional PPP Environment in Mozambique, 2010, p.19). This rationale seems to be due to the legacy of the central planning economic model that preceded the market economy, as well patterns older still of how authority is conceived and exercised. Next, the authors recommend that the staff need to be trained in basic essential elements of what a PPP is and to move from the concept of delivering services themselves to managing and assuring their delivery by others under contract.

5.2.2 PPP Regulation, Approval and Implementation Roles in Mozambique

Nathan Associates conducted a review of the PPP Draft Law version 27th April, 2010 prior to its publication to note that the “PPPs, LSPs, and BCs Law” sets up double oversight, by sector, and financial entities, with detailed distribution of responsibilities between them. They acknowledged the need for creation of a PPP and Megaprojects Unit (“PPP Unit”) in the financial oversight entity (i.e., Ministry of Finance) (USAID Trade and Investment Project (TIPMOZ) by Roger Manning of Nathan Associates Inc, 2010, p.4). Next to sector and financial oversight, PPP projects the authors recommended PPP projects to underly regulatory authority in their areas of activity.

IGC analysis of the Law and the Unit structure indicates the advantages of having a centralized institution to have the needed human resources with experience to advice on issues arising in PPPs within the Unit, while responding to the demands of the different sectors. They also recognize the need for specific sectors to supervise the operational performance of the PPP as in Article 5 of the current PPP Law (but see section 3.10 on independence of the supervisory duties). They do, however, recommend the need to give the ultimate approval to the Ministry of Finance given that the central PPP unit may have incentives to be rather generous in contracting since its performance will be evaluated according to its success in PPP deals (IGC; Assessment of Public-Private Partnerships in



Mozambique, 2012, p.15). Thus contracts should have the explicit approval of the Finance Minister, which should have a small specialized Unit dedicated to analyzing their contingent financial implications.

Furthermore, the oversight mechanism seems to be structured in a complex manner (USAID Trade and Investment Project (TIPMOZ) by Roger Manring of Nathan Associates Inc, 2010, p.4). A multilayered structure of double “tutela” (oversight), PPP Unit and regulatory authority supervising PPP projects is quite good and follows the recommendations provide in the Regional Strategy paper, but may create great administrative inefficiencies (USAID Trade and Investment Project (TIPMOZ) by Roger Manring of Nathan Associates Inc, 2010, p.4). According to Nathan Associates, the “PPPs, LSPs, and BCs Law” does not appear - for all the detailed listings of oversight responsibilities – to have adequately addressed and provided for clear lines of authority, division of responsibility and mechanisms to consolidate and coordinate oversight activity. Furthermore, according to the lawyers, the overall tonality of oversight in the Law and Regulations seems to be one of control, with no attention to need for facilitation of PPP activities, particularly with regard to pertinent issues such as providing permits, and licenses (USAID Trade and Investment Project (TIPMOZ) by Roger Manring of Nathan Associates Inc, 2010, p.4).

As far as additional oversight by regulatory authorities is concerned, according to the Law, sector and sub-sector regulators will also have authority over PPP projects, in addition to any sector and financial tutela. The authors refer to the “PPPs, LSPs, and BCs Law” (Art. 9) to highlight that the regulatory authority functions involve ensuring PPP project compliance with its contractual obligations, as well as with laws, rules and standards governing its activities and investments. Such functions suggest possible overlap with the roles of sector and financial oversight bodies. In the interest of avoiding conflicts and confusion, greater specificity is needed to spell out the division of powers between regulatory bodies and oversight entities with which PPP projects will deal. They recommend working on descriptions of such responsibilities including the definition of an explicit review procedure to give PPP projects right of recourse against regulatory or other supervisory or oversight decisions.

5.3 Mozambique Legal Framework

The Mozambican legal system is based on the Romano-Germanic tradition of civil law. It is directly inherited from Portugal; at independence, all Portuguese laws not inconsistent with the new constitution were retained and remained in force. Much background law from that period including, for example, the commercial code, the civil code and the civil procedure code (much of it dating from the late 19th and early 20th centuries) remains to date with little modification (SADC Banking Association appointed Edward Nathan & Friedland (Pty) Ltd (‘ENF’), together with SAL Consultoria e Investimentos, Lda, (‘SAL’), 2003). During the socialist period after independence, the Soviet inspired economic and organizational legislation spread around the country based on underlying Portuguese legal framework. Much of this has now been replaced with contemporary legislation consistent with market principles.

Mozambique is quite an interesting country to follow in terms of the evolvement of its regulatory regime over time while practicing PPPs and implementing them with no specific structured legal procedures for PPPs. Thus, the first PPP in Mozambique was for the paved highway between Maputo and Witbank in South Africa, and later reaching Pretoria, awarded in 1996 to Trans-African Concessions (TRAC) consortium. It required some regulatory changes, introduced by Decree N°31/96 (amended by Decree 38/97) (IGC, Assessment of Public-Private Partnerships in Mozambique, 2012, p.3). TRAC was awarded under South African PPP Legislation, and there is no example of a highway or



bridge awarded under these decrees. It is also interesting that even though there were several other PPPs awarded before 2003 (see below), it was only in that year that the Decree-Law 86/2003 legally defined the term PPP. Therefore, previous PPPs were dealt with on a case-by-case basis, within the very broad parameters provided by the previous decrees, providing less judicial certainty than under a PPP law.

The “PPPs, LSPs, and BCs Law” issued in 2011 addresses not only matters governing the Institutional Framework, but also issues covering the pre-contractual stages of PPP Projects; next to matters related to types of public contracting procedures; financial guarantees and incentives to investment; contracts and respective revisions or amendments; execution of contracts, redemption, causes of termination, amongst others; prevention and mitigation of risks in PPP; and sharing of benefits. The Law recognises three PPP modalities: concessions, operating or leasing contracts and management contracts, and sets a maximum of 25 years for concessions, 20 years for leases, and 15 years for management contracts. The Law also regulates the establishment of Special Purpose Vehicles (SPV) to manage all aspects of a project, and authorizes the provision of guarantees and incentives from the Government to the private sector. Furthermore, the Law obliges the State General Account to report on the performance of PPPs at the end of each fiscal year. The Law further stipulates that PPPs are to be appropriately accounted for in the budgeting framework due to their long-term commitments on the public budget. However, the Law provides no further guidance on the concrete steps needed to be taken to account for this matter.

As means of clarifying some conflicting issues, the Government of Mozambique approved Regulation to the PPP’s, LSP’s and BC’s Law, by way of Decree 16/2012 in June, 2012 (Mozambique Legal Circle, Public-Private Partnerships, Large Scale Projects, and Business Concessionsin, 2012). Besides establishing the Institutional Framework and detailing ventures, procedural stages and proceedings, the new Regulation provides for an important clarification point for circumstances where some essential elements characterizing a PPP, a LSP and/or a BC venture overlap. The next chart provides a summary of some of the matters addressed in the new Regulation.

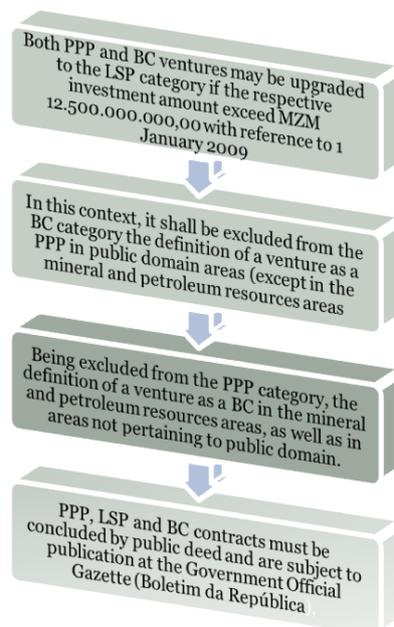


Chart 5: Overview of Issues addressed in the Regulation 2012,
Source: Mozambique Legal Circle, Public-Private Partnerships, Large Scale Projects, and Business Concessionsin, 2012



IGC evaluated more thoroughly the 2011 “PPPs, LSPs, and BCs Law” to stipulate that it does provide a general Framework for PPPs, however, there remain some weaknesses. These include an excessive discretion for public sector in terms of negotiations with private parties --Paragraphs 3 and 4 of Article 13 regarding the assignment of a PPP (though the Law considers this possibility only for exceptional cases) (IGC, Assessment of Public-Private Partnerships in Mozambique,2012). This is even the case for Paragraph 2 of Article 13 where the two-stage awarding procedure requires negotiations between the bidders and officials. In addition, the Law seems to suffer from lack of general methods of conflict resolution --thus bidders face increased risks. Moreover, there are no detailed regulations concerning how to deal with unsolicited proposals, which can lead to conflicts with firms presenting proposals, or to the Government having to incur the cost of evaluating unviable unsolicited proposals. Other weaknesses in view of IGC include limitations concerning transparency (only the main aspects of the contract are published), which, when combined with the institutional fragility of the bureaucracy, can lead to the possibility of corruption of the system (as defined in Article 36 of the “PPPs, LSPs, and BCs Law”) (IGC, Assessment of Public-Private Partnerships in Mozambique,2012, p.4). The awarding procedure of PPPs is, generally the public tender.

PPP arrangements are about allocating risks efficiently, and the need to accommodate a diversity of industries and economic conditions in doing so. PPP Laws should generally allow for and provide levy for proper negotiations. There should be no unnecessary statutory or regulatory limitations placed upon the contracting authority’s ability to agree on an allocation of risks that is suited to the needs of the project. In Mozambique, some parts of the Law and Regulations seem that they would be excessively rigid and binding on negotiators as they seek allocations of risk that are balanced and appropriate in any given project. These include certain provisions concerning contract duration, national ownership, concession fees and royalties, and profits and dividends, all major ingredients in the economic and financial dynamics of PPPs/concessions. For instance, for concession contracts (contrato de concessão) and operating concession contracts (contrato de cessão de exploração), the Law requires a concession award fee to be paid at contract signing, in an amount between 5% and 10% of expected average annual after-tax profits. The Regulations provide additional information on the exact percentage fee rates to be set within this range, based on contract duration. The calculation of this fee base (expected average annual after-tax profits) is apparently undiscounted (USAID Trade and Investment Project (TIPMOZ) by Roger Manring of Nathan Associates, 2010, p.7). For all concession contracts and operating concession contracts not governed by the mining/petroleum fiscal regime, the Law provides that royalties be paid to the State or public sector contracting entity in amounts equivalent to 5% to 10% of annual after-tax profits (fixed charge) and 5% to 10% of gross receipts net of indirect taxes (variable charge). Regulations provide that exact percentage fee rates are to be set within this range, based on contract duration. Law/Regulations establish a similar royalty arrangement for management contracts (cessão de gestão), again equivalent to 5% to 10% of gross receipts net of indirect taxes, with exact rates set relative to contract duration.

According to OECD, the Government is considering developing a separate Law for small-scale and municipal PPPs, and a new Procurement Law has also come into force. One of the stated objectives of the Procurement Law is to ensure that large investment projects multiply linkages with the local economy, thus better contributing to wealth and employment creation (OECD Investment Policy Reviews Mozambique, 2013, p.29).

6. Recommendations

The Government of Mozambique has taken considerable decisions in the past few years to



promote PPPs. The PPP Framework has developed from infancy stages towards a more mature Institutional, Legal and Policy setting. With the enactment of the “PPPs, LSPs, and BCs Law,” the Government aims at attracting investment, and economic and social development to the country. The Law establishes the guidelines of the awarding process, the implementation, and the monitoring of these three modalities of involvement of the private sector in the promotion of development. The Regulations on PPPs finalised in July 2012, provide more clear specifications on how PPPs are to be undertaken and how issues that bear on PPP implementation are to be managed. They provide details on risk sharing related to fiscal, fiduciary and management risks. Moreover, a PPP Unit has been created under the Ministry of Finance which is a positive step signalling the Government’s commitment to the advancement of its PPP scheme.

There is growing interest in PPPs as an alternative method of procurement of public services in the country. Public sector entities are being capacitated in the recognition that PPPs are long term activities that need further promotion and capacitation. Some private sector capacity has been already established. Several projects have been studied and are ready to move towards financial close and implementation phases. Since most of the projects are earmarked to be implemented in the same period of time (next 3-8 years), it is likely the wider investor/financial community needs to be involved. This has already been tested with financing coming from places as remote as Brazil, Australia and China but it will evolve also to include other types of investors/financiers (e.g. private equity).

There is a strong political support for PPPs in Mozambique. In fact, the Government recognizes the only way to expedite infrastructure delivery in the country is to engage with the private sector. The Law defines the procurement process and specifies the way private sector can get involved (solicited and unsolicited bids and the process thereafter). The Government is keen on involving the private sector as much as possible. Proof is several consultation processes regarding topics on participation, investment and raising financing from private sector. Furthermore, Government is currently looking at finalising legislation to further develop capital markets.

The selection of appropriate projects for development as PPPs requires an understanding of the features of, and environment required for a successful PPP project. This may be based on experience gained within a country, but also from wider experience in other countries. For Mozambique, PPPs pose new demands on public agents, as skills are needed to specify outputs, to understand complex financial structures and to allocate and manage risks in the most efficient manner. In order to further attract private sector in provision of PPPs across various sectors Mozambique shall better invest in building capacity to identify and develop PPPs and to engage private sector for investment purposes. We recommend that public agents get a better understanding of the requirements posed on structuring, designing and managing a PPP procurement process to clearly identify outputs, conduct risk allocation, assess financial feasibility, etc. The examination of the status of PPPs indicates the need to be proactive by assisting the Government in strengthening its capacity to prepare bankable projects that may be marketed to various financiers. Such capacity

Concrete SADC3P Recommendations:

- Assist in developing a targeted small-scale PPP approach for Mozambique to promote municipal and smaller PPPs.
 - Assist the Government of Mozambique in capacity building in terms of getting a clear understanding of the requirements posed to implementation and procurement of PPPs;
- Assist Government Ministries in identifying 1-2 selective projects and to conduct corresponding feasibility studies.



seems not to exist within Government.

OECD analysis indicates the need for the Government of Mozambique to also invest in strengthening the Regulatory Framework for procurement of PPPs in infrastructure. Although the 2012 Regulations on the Law on PPPs, LSPs and BCs, and the establishment of the PPP Unit are some of the first steps towards further bolstering of PPP schemes in the country, there is need for more action. The Government's attempt to introduce a Law for small-scale and municipal PPPs is considered as an important step towards unlocking important investment opportunities for decentralised infrastructure provision (OECD, OECD Investment Policy Review Mozambique, 2013, p.45).



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